

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs June 21, 2007

**STATE OF TENNESSEE DEPARTMENT OF CHILDREN'S SERVICES v.  
K.W.C.**

**Appeal from the Juvenile Court for Hamilton County  
No. 205,654     Suzanne Bailey, Judge**

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**No. E2007-00307-COA-R3-PT - FILED AUGUST 1, 2007**

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The trial court terminated the parental rights of K.W.C. ("Mother") with respect to her minor child, W.K.S. (DOB: July 21, 1999), upon finding, by clear and convincing evidence, that grounds for terminating her parental rights existed and that termination was in the best interest of the child. Mother appeals. We affirm the trial court's judgment terminating the parental rights of Mother, but vacate portions of the trial court's rationale for its judgment.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court  
Affirmed; Portions of the Court's Rationale Vacated; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and SHARON G. LEE, JJ., joined.

Autry L. Jones, Chattanooga, Tennessee, for the appellant, K.W.C.

Robert E. Cooper, Jr., Attorney General and Reporter, and Amy T. McConnell, Assistant Attorney General, for the appellee, State of Tennessee Department of Children's Services.

**OPINION**

I.

On February 10, 2005, the Tennessee Department of Children's Services ("DCS") filed a petition for temporary custody of W.K.S., alleging that Mother had subjected the child to ongoing physical abuse. The petition details several instances of abuse that W.K.S. disclosed he had suffered at the hands of his mother. Specifically, W.K.S. reported that his mother hit him in the eye with a shoe on August 16, 2004, that his mother stabbed him in the head with a fork on January 18, 2005, that his mother hit him in the head with a board on January 26, 2005, and that his mother grabbed him by the head and threw him into the television on February 8, 2005. W.K.S. was observed to have injuries consistent with these reports. W.K.S. was removed from the custody of Mother on an

emergency basis on February 8, 2005.<sup>1</sup> Following a hearing on April 27, 2005, the trial court adjudicated W.K.S. to be dependent and neglected based upon clear and convincing proof that Mother had inflicted the physical abuse. DCS was awarded temporary custody of W.K.S. Mother requested a rehearing of the matter, but the trial court dismissed the request upon her failure to appear. At some point in time, Mother was arrested and charged with child abuse as a result of the incidents of physical abuse stated in the petition for temporary custody.

DCS prepared its first permanency plan in this case on February 23, 2005. The goal of the plan was Mother's reunification with W.K.S. Mother was required by the plan to accomplish the following by August 23, 2005: (1) maintain safe and stable housing for a minimum of six months; (2) demonstrate financial ability for a minimum of six months and pay child support as ordered by the court; (3) become a more effective parent by undergoing a parenting evaluation and following the recommendations; and (4) maintain contact with DCS at all times. Mother signed this plan on February 23, 2005. On May 4, 2005, the trial court found these requirements to be reasonable and ratified the plan.

On February 7, 2006, DCS filed a petition to terminate the parental rights of Mother, on multiple grounds: abandonment by failure to provide a suitable home; abandonment by failure to support; substantial noncompliance with the permanency plan; and failure to remedy persistent conditions. The petition also alleged that termination was in the best interest of W.K.S.

DCS created a second permanency plan on March 28, 2006. However, the goal of the plan changed from a single goal to dual goals: adoption and reunification. In order to be reunified with W.K.S., Mother was obligated to meet the same requirements as stated in the first plan, this time by August 23, 2006. By this point in time, Mother had completed her parenting evaluation, and the only difference in the second plan was that the requirement to become a more effective parent had been expanded to include continued individual counseling, intensive parenting education to address physical discipline and anger management issues, and continued alcohol and drug counseling. Mother signed this plan on March 28, 2006. Mother also received a copy of the "Criteria & Procedures for Termination of Parental Rights" from DCS on March 28, 2006. She signed this document, which includes a list of the statutory grounds for termination of parental rights, acknowledging that the contents were explained to her. The trial court ratified the second plan on April 19, 2006.

A plenary hearing was held on December 12 and 18, 2006. The trial court terminated the parental rights of Mother, finding clear and convincing evidence to support the four grounds for termination stated in the petition.<sup>2</sup> The trial court also found by clear and convincing evidence that

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<sup>1</sup> According to the petition to terminate parental rights filed in this case, W.K.S. was removed from Mother's care on a prior occasion when the police conducted a drug raid on the home and arrested her in Rhea County.

<sup>2</sup> The parental rights of J.L.S., the father of W.K.S., were terminated by the trial court in a separate order. This matter is not before us on this appeal.

termination was in the best interest of W.K.S. In its final judgment, entered on January 19, 2007, the trial court found, in pertinent part, as follows:

[W.K.S.'s] situation prevented reasonable efforts being made prior to removal in that [W.K.S.] was removed as a result of injuries inflicted by the Mother. The Mother was subsequently found by this Court to have inflicted the injuries and child abuse charges are pending in the Criminal Court for Hamilton County, Tennessee as a result of the injuries sustained by [W.K.S.]. . . .

[DCS] made reasonable efforts to assist [Mother] in establishing a suitable home for [W.K.S.] for a period of at least four (4) months following the removal, but [Mother] made no reasonable efforts to provide a suitable home for [W.K.S.]. Since [W.K.S.] was taken into custody, [Mother] has failed to provide DCS or the Court with proof of appropriate housing from which she could not be evicted at the whim of the owner.

Grounds for terminating the parental rights of [Mother] to [W.K.S.] exist pursuant to T.C.A. § 36-1-113 and the petition filed by [DCS] is well taken and should be sustained and the relief requested granted for the causes stated in that:

[W.K.S.] has been in the custody of [DCS] for at least six (6) months, specifically since February 9, 2005, and that;

[Mother] failed to comply in a substantial manner with the statement of responsibilities set out in periodic foster care plans prepared for and signed by [Mother] after [W.K.S.] was found to be dependent and neglected. The responsibilities outlined were directly related to and aimed at remedying the conditions which necessitated foster care placement and were adopted by the Court without objection.

Specifically, [Mother] failed to obtain and maintain housing suitable for herself and [W.K.S.]. The Mother failed to provide DCS or the Court with copies of lease agreements or other documents to indicate that she obtained suitable housing that she has a legal right to occupy and from which she cannot be evicted by the owner or landlord without cause.

The Mother did not participate in a parenting assessment as required by her permanency plan until February of 2006, approximately a year after the removal. Dr. Tom Biller, psychologist, testified that he

administered a parenting assessment in February of 2004 which was requested by DCS due to the removal of another of [Mother's] children and again in February of 2006. He stated that the results of the two assessments were basically the same. Dr. Biller testified that [Mother] suffers a moderate bipolar disorder, anxiety disorder, and that she admitted to using methamphetamine.

Dr. Biller testified that for the Mother to be able to function as a parent, it would be necessary for her to continue in counseling and to take medication to control her bipolar disorder. The Mother provided no evidence to DCS or the Court that she has been regular in attending counseling. Quite the contrary, her counsel argued that she had attended fifty percent of her counseling sessions. Further, the Mother argued through counsel that [DCS] failed to provide transportation to the counseling sessions. At the same time, however, she testified that she was able to maintain several different jobs and seemed to have no difficulty in obtaining transportation to and from work.

Dr. Biller also testified that the Mother's use of illegal substances would greatly enhance her bipolar condition. The Mother admitted to having used Methamphetamine and completed intensive outpatient treatment at Bradford Health Services. Nina Colvin from Bradford indicated that [Mother] has been enrolled in the continuing care program at Bradford since completing the intensive outpatient treatment program in November of 2005. Ms. Colvin testified that her attendance has been sporadic and that while she has not failed a drug screen since she entered the continuing care program, she has only been present for six (6) of the twelve (12) drug screens that she should have taken. Further, Ms. Colvin testified that the Mother has only recently begun to participate in a twelve-step program such as Alcoholics Anonymous or Narcotics Anonymous. She further testified that staying off drugs is good, but not enough to predict success without participation in AA or NA. Ms. Colvin testified that the Mother's record in the continuing care program would indicate a high tendency to relapse.

Nancy Rose, a counselor with The Partnership for Families, Children and Adults was called to testify by the Mother's attorney. She testified that the Mother participated in eight (8) counseling sessions with her beginning in May of 2006, after the termination petition was filed. Ms. Rose stated that the Mother has made some progress in the counseling, but quit coming to sessions instead of being discharged.

Further, she testified that at most of their sessions they discussed the Mother's need to take her medication but that she refused to take the medications because she did not like the side effects. Ms. Rose stated that it is not uncommon for persons who suffer bipolar disorder to refuse to take medication because of the side effects, and that;

The conditions which led to the removal of [W.K.S.] persist or other conditions persist which in all probability would cause [W.K.S.] to be subject to further abuse and neglect and which, therefore, prevent placement of [W.K.S.] with [Mother]. There is little likelihood that these conditions will be remedied at an early date so that [W.K.S.] can be placed in the care and custody of the Mother in the near future. Specifically, [W.K.S.] came into custody as a result of physical abuse by the Mother. Dr. Biller testified that with her particular psychiatric disorders discipline could be a problem for her, particularly if [W.K.S.] were oppositional and defiant. He further stated that she might not be able to control [W.K.S.] without over disciplining. The Mother has provided no proof to the Court that she has completed or will soon complete treatment such that there is any certainty that this will not be a problem for her and that [W.K.S.] will be safe from further abuse at her hands, and that;

[Mother] abandoned [W.K.S.] pursuant to T.C.A. § 36-1-113(g)(9)(A)(ii) by willfully failing to support [W.K.S.] for four (4) consecutive months immediately preceding the filing of this petition or for four (4) consecutive months immediately preceding incarceration. She testified that she was employed and at some times worked more than one job during this period. [Mother] claimed that she attempted to pay child support at some point, but that she was unable to obtain an order of support from the Child Support division of this Court. However, she did not provide any proof of her efforts to make arrangements to pay support in a timely fashion. [Mother] was first instructed to provide support for [W.K.S.] in the February 200[5] permanency plan. Clearly, had she acted in a timely fashion, she could have been making appropriate support payments long before the petition for termination was filed. The Mother has been represented by counsel throughout the pendency of the actions regarding [W.K.S.] in this Court. It is not, therefore, unreasonable for the Court to expect that she was able to understand the importance of providing support for [W.K.S.] and/or had access to her attorney if she had questions about her support obligations.

Pursuant to T.C.A. § 36-1-113, the Court finds by clear and convincing evidence that it is in the best interest of [W.K.S.] and the public that all of the parental rights of [Mother] to [W.K.S.] be forever terminated and that the complete[ ] custody, control and complete guardianship of [W.K.S.] should be awarded to [DCS] with the right to place [W.K.S.] for adoption and to consent to any adoption in loco parentis. Specifically, the Court finds that:

[Mother] has failed to make any adjustment of circumstance, conduct or conditions to make it safe and in [W.K.S.'s] best interest to be placed in her care. Despite the efforts of [DCS] to assist [Mother] in making necessary changes, she is no more able to provide for [W.K.S.] today than when he was first taken into custody. Specifically, the Mother has not fully engaged with counseling and has failed to participate in a twelve-step program both of which are necessary to prevent the possibility of [W.K.S.] suffering further abuse at the hands of his mother if returned; and that

[Mother] has no suitable home for [W.K.S.]. She depends on the charity of her brother and has offered no evidence that the home is suitable for [W.K.S.]; and that

Continuation of the parental relationship greatly diminishes [W.K.S.'s] chances of early integration into a stable and permanent home. A change of caretakers and homes is likely to have a highly negative effect on [W.K.S.]. He has been in foster care for approximately two (2) years and is doing well. His foster mother testified that [W.K.S.] was significantly delayed educationally, had serious speech problems, demonstrated serious boundary issues, and exhibited bad behaviors when he first came into custody. He has improved significantly while in her home and she is eager to adopt him and provide him with a permanent home as soon as possible.

(Paragraph numbering in original omitted).

## II.

The law is well settled that “parents have a fundamental right to the care, custody, and control of their children.” *In re Drinnon*, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988) (citing *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972)). However, this right is not absolute and may be terminated if there is clear and convincing evidence justifying termination under the pertinent statute. *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). Clear and convincing evidence is evidence that “eliminates any serious or substantial doubt

concerning the correctness of the conclusions to be drawn from the evidence.” *O’Daniel v. Messier*, 905 S.W.2d 182, 188 (Tenn. Ct. App. 1995).

### III.

Our Supreme Court recently reiterated the standard of review for cases involving termination of parental rights:

Parties seeking to terminate parental rights must prove two elements. First, they have the burden of proving that there exists a statutory ground for termination. Tenn. Code Ann. § 36-1-113(c)(1) (2005); *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002). Second, they must prove that termination of parental rights is in the child’s best interest. Tenn. Code Ann. § 36-1-113(c)(2) (2005); *In re F.R.R., III*, 193 S.W.3d 528, 530 (Tenn. 2006). Both of these elements must be established by clear and convincing evidence. *See* Tenn. Code Ann. § 36-1-113(c)(1) (2005); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002).

On appeal, the trial court’s findings of fact are reviewed de novo upon the record accompanied by a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *In re F.R.R.*, 193 S.W.3d at 530. In weighing the preponderance of the evidence, great weight is afforded to the trial court’s determinations of witness credibility, which shall not be reversed absent clear and convincing evidence to the contrary. *See Jones*, 92 S.W.3d at 838. Questions of law, however, are reviewed de novo with no presumption of correctness. *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 744-45 (Tenn. 2002).

*In re Adoption of A.M.H.*, 215 S.W.3d 793, 808-09 (Tenn. 2007). Therefore, our duty on factual matters is to “determine whether the trial court’s findings, made under a clear and convincing standard, are supported by a preponderance of the evidence.” *In re F.R.R.*, 193 S.W.3d at 530.

### IV.

T.C.A. § 36-1-113(g) lists the grounds upon which parental rights may be terminated, and “the existence of any one of the statutory bases will support a termination of parental rights.” *In re C.W.W.*, 37 S.W.3d 467, 473 (Tenn. Ct. App. 2000); *see In re D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003) (“The trial court is required to find only one statutory ground for termination of parental rights.”). The issues raised in the pleadings, and the trial court’s findings, implicate the following statutory provisions:

*T.C.A. § 37-1-147 (2005)*

(a) The juvenile court shall be authorized to terminate the rights of a parent or guardian to a child upon the grounds and pursuant to the procedures set forth in title 36, chapter 1, part 1.

\* \* \*

*T.C.A. § 36-1-113 (Supp. 2006)*

(a) The chancery and circuit courts shall have concurrent jurisdiction with the juvenile court to terminate parental or guardianship rights to a child in a separate proceeding, . . . by utilizing any grounds for termination of parental or guardianship rights permitted in this part or in title 37, chapter 1, part 1 and title 37, chapter 2, part 4.

\* \* \*

(c) Termination of parental or guardianship rights must be based upon:

- (1) A finding by the court by clear and convincing evidence that the grounds for termination of parental or guardianship rights have been established; and
- (2) That termination of the parent's or guardian's rights is in the best interests of the child.

\* \* \*

(g) Initiation of termination of parental or guardianship rights may be based upon any of the following grounds:

- (1) Abandonment by the parent or guardian, as defined in § 36-1-102, has occurred;
- (2) There has been substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency plan or a plan of care pursuant to the provisions of title 37, chapter 2, part 4;
- (3) The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:



(A) The conditions that led to the child's removal or other conditions that in all reasonable probability would cause the child to be subjected to further abuse or neglect and that, therefore, prevent the child's safe return to the care of the parent(s) or guardian(s), still persist;

(B) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and

(C) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home[.]

\* \* \*

(9)(A) The parental rights of any person who, at the time of the filing of a petition to terminate the parental rights of such person or, if no such petition is filed, at the time of the filing of a petition to adopt a child, is not the legal parent or guardian of such child or who is described in § 36-1-117(b) or (c) may also be terminated based upon any one (1) or more of the following additional grounds:

\* \* \*

(ii) The person has failed, without good cause or excuse, to make reasonable and consistent payments for the support of the child in accordance with the child support guidelines promulgated by the department pursuant to § 36-5-101[.]

\* \* \*

*T.C.A. § 36-1-102 (2005)*

As used in this part, unless the context otherwise requires:

(1)(A) For purposes of terminating the parental or guardian rights of parent(s) or guardian(s) of a child to that child in order to make that child available for adoption, "abandonment" means that:

(i) For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the

petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or have willfully failed to make reasonable payments toward the support of the child; [or]

(ii) The child has been removed from the home of the parent(s) or guardian(s) as the result of a petition filed in the juvenile court in which the child was found to be a dependent and neglected child, as defined in § 37-1-102, and the child was placed in the custody of the department or a licensed child-placing agency, that the juvenile court found, or the court where the termination of parental rights petition is filed finds, that the department or a licensed child-placing agency made reasonable efforts to prevent removal of the child or that the circumstances of the child's situation prevented reasonable efforts from being made prior to the child's removal; and for a period of four (4) months following the removal, the department or agency has made reasonable efforts to assist the parent(s) or guardian(s) to establish a suitable home for the child, but that the parent(s) or guardian(s) have made no reasonable efforts to provide a suitable home and have demonstrated a lack of concern for the child to such a degree that it appears unlikely that they will be able to provide a suitable home for the child at an early date[.]

\* \* \*

*T.C.A. § 37-2-403 (2005)*

(a)(1) Within thirty (30) days of the date of foster care placement, an agency shall prepare a plan for each child in its foster care. . . .

\* \* \*

(2)(A) The permanency plan for any child in foster care shall include a statement of responsibilities between the parents, the agency and the caseworker of such agency. Such statements shall include the responsibilities of each party in specific terms and shall be reasonably related to the achievement of the goal specified in subdivision (a)(1). The statement shall include the definitions of "abandonment" and "abandonment of an infant" contained in § 36-1-102 and the criteria and procedures for termination of parental rights. Each party shall sign the statement and be given a copy of it. The court must review the proposed plan, make any necessary modifications and ratify or approve the plan within sixty (60) days of the foster care placement.

The department of children's services shall . . . determine the required elements or contents of the permanency plan.

(B)(i) The parents or legal guardians of the child shall receive notice to appear at the court review of the permanency plan or the plan of care and the court shall explain on the record the law relating to abandonment contained in § 36-1-102, and shall explain that the consequences of failure to visit or support the child will be termination of the parents' or guardians' rights to the child, and the court will further explain that the parents or guardians may seek an attorney to represent the parents or guardians in any termination proceeding. If the parents or legal guardians are not at the hearing to review the permanency plan or plan of care, the court shall explain to the parents or guardians at any subsequent hearing regarding the child held thereafter, that the consequences of failure to visit or support the child will be termination of the parents' or guardians' rights to the child and that they may seek an attorney to represent the parents or guardians in a termination proceeding.

(ii) If the parents or guardians of the child cannot be given notice to appear at the court review of the permanency plan or plan of care, or if they refuse or fail to appear at the court review of the permanency plan or plan of care, or cannot be found to provide notice for the court review of the permanency plan or plan of care, any agency that holds custody of the child in foster care or in any other type of care and that seeks to terminate parental or guardian rights based upon abandonment of that child under § 36-1-102, shall not be precluded from proceeding with the termination based upon the grounds of abandonment, if the agency demonstrates at the time of the termination proceeding:

(a) That the court record shows, or the petitioning party presents to the court a copy of the permanency plan or plan of care that shows that the defendant parents or legal guardians, subsequent to the court review in subdivision (a)(2)(B)(i), has signed the portion of the permanency plan or plan of care that describes the criteria for establishing abandonment under § 36-1-102, or that the court record shows that, at a subsequent hearing regarding the child, the court made the statements to the parents or legal guardians required by subdivision (a)(2)(B)(i).

(b) By an affidavit, that the child's permanency plan or plan of care containing language that describes the criteria for establishing

abandonment under § 36-1-102 was presented by the agency party to the parents or guardians at any time prior to filing the termination petition, or that there was an attempt at any time to present the plan that describes the criteria for establishing abandonment under § 36-1-102 to the parents or guardians at any time by the agency party, and that such attempt was refused by the parents or guardians.

(c) That, if the court record does not contain a signed copy of the permanency plan or plan of care, or if the petitioning agency cannot present evidence of a permanency plan or plan of care showing evidence of such notice having been given or an affidavit showing that the plan was given or that the plan was attempted to be given to the parents or guardians by the agency and was refused by the parents or guardians, and, in this circumstance, if there is no other court record of the explanation by the court of the consequences of abandonment and the right to seek an attorney at any time, then the petitioning agency shall file with the court an affidavit in the termination proceeding that describes in detail the party's diligent efforts to bring such notice required by subdivision (a)(2)(B)(i) to such parent or guardian at any time prior to filing the agency's filing of the termination petition.

(C) Substantial noncompliance by the parent with the statement of responsibilities provides grounds for the termination of parental rights, notwithstanding other statutory provisions for termination of parental rights, and notwithstanding the failure of the parent to sign or to agree to such statement if the court finds the parent was informed of its contents, and that the requirements of the statement are reasonable and related to remedying the conditions that necessitate foster care placement.

## V.

Mother raises several issues on appeal. In our view, these issues present the following questions:

1. Did the trial court err by terminating Mother's parental rights on the grounds of abandonment by failure to provide a suitable home, abandonment by failure to support, substantial noncompliance with the permanency plans, and failure to remedy persistent conditions, where Mother did not receive notice under T.C.A. § 37-2-403?

2. Did the trial court err by terminating Mother's parental rights on the ground of abandonment for failure to support under T.C.A. § 36-1-113(g)(9)(A)(ii)?
3. Did the trial court err by finding clear and convincing evidence of substantial noncompliance with the permanency plans as a ground for terminating Mother's parental rights?
4. Did the trial court err by finding clear and convincing evidence of failure to remedy persistent conditions as a ground for terminating Mother's parental rights?
5. Did the trial court err by finding clear and convincing evidence that it was in the best interest of the minor child to terminate Mother's parental rights?

VI.

A.

We will briefly address the first two questions presented for review before we discuss the more substantive issues. As an overarching issue, Mother maintains that it was error for the trial court to terminate her parental rights on the grounds of abandonment by failure to provide a suitable home, abandonment by failure to support, substantial noncompliance with the permanency plans, and failure to remedy persistent conditions, where she did not receive notice under T.C.A. § 37-2-403. In support of her position that she did not receive statutory notice of any of the four grounds, Mother relies upon the decision of *In re J.L.E.*, No. M2004-02133-COA-R3-PT, 2005 WL 1541862 (Tenn. Ct. App. M.S., filed June 30, 2005).

In the case of *In re J.L.E.*, this Court held that DCS was precluded from proceeding to terminate a mother's parental rights on the ground of abandonment by failure to provide a suitable home because it failed to show that the mother was given notice of the definition of abandonment as required by T.C.A. § 37-2-403. 2005 WL 1541862, at \*7-10. The *In re J.L.E.* decision summarizes the procedure to be followed under T.C.A. § 37-2-403 with respect to providing notice of the meaning of abandonment:

The General Assembly has established requirements for the type of notice that must be given a parent as a prerequisite to proceedings to terminate on the ground of abandonment. Tennessee Code Annotated § 37-2-403 establishes requirements for a permanency plan for a child placed in foster care. It also establishes requirements for notice to parents of the definition and potential consequences of "abandonment" as that term is defined in Tenn. Code Ann. § 36-1-

102.FN10 First, that definition and the potential and procedures for termination of parental rights are to be included on the initial permanency plan itself, which is to be signed by the parent. Tenn. Code Ann. § 37-2-403(a)(2)(A). Second, at the hearing on the court's consideration of the permanency plan, the court "shall explain on the record the law relating to abandonment contained in § 36-1-102." Tenn. Code Ann. § 37-2-403(a)(2)(B)(i). If the parents are not present at the first hearing, the court is to make the required explanation at any subsequent hearings. *Id.*

FN10 Tenn. Code Ann. § 37-2-403 includes specific requirements about notice of failure to support or failure to visit, referring to other statutory definitions of abandonment, but the statute's repeated references to abandonment as defined in § 36-1-102 make it clear that the notice requirements apply to all definitions of abandonment.

If the parents do not appear at permanency plan hearings or cannot be provided notice of such hearings, DCS may still proceed to terminate parental rights on the ground of abandonment "under § 36-1-102" only if DCS demonstrates specified things at the time of the termination proceeding. Tenn. Code Ann. § 37-2-403(a)(2)(B)(ii)[(a), (b), (c)].

2005 WL 1541862, at \*7-8.

The mother in *In re J.L.E.* did not receive written notice and an explanation of the definition of abandonment and the criteria and procedures for termination of parental rights until after DCS filed its petition to terminate her parental rights. *Id.*, at \*9. As the *In re J.L.E.* Court stated, "[o]bviously, notifying Mother in February of 2004 that her failure to establish a suitable home by October of 2003 constituted grounds for termination in a petition that had already been filed does not meet the statutory requirement of notice." *Id.* In the present case, Mother argues that DCS likewise did not provide her with a copy of the "Criteria & Procedures for Termination of Parental Rights" until March 28, 2006, over a month after DCS filed its petition to terminate her parental rights on February 7, 2006.

In its brief, DCS acknowledges the authority of *In re J.L.E.* and concedes that Mother did not receive proper notice of the definition of abandonment as required by T.C.A. § 37-2-403. Accordingly, we vacate so much of the trial court's judgment terminating Mother's parental rights as is based upon a finding of abandonment by failure to provide a suitable home and abandonment by failure to support.

With respect to Mother's argument that DCS also failed to provide her with notice of the grounds of substantial noncompliance with the permanency plans and failure to remedy persistent conditions, DCS maintains that *In re J.L.E.* does not hold that the failure to provide notice under T.C.A. § 37-2-403 would bar parental termination on these other two grounds. We agree with DCS on this point. The plain language of T.C.A. § 37-2-403 makes it clear that its provisions apply to receiving notice of the meaning of *abandonment*, not to any other ground for termination. The *In re J.L.E.* decision supports this reading of the statute. Therefore, later in this opinion, we will evaluate whether there is clear and convincing evidence to support a finding of substantial noncompliance with the permanency plans and/or failure to remedy persistent conditions.

## B.

Mother also contends that the trial court erred when it terminated her parental rights on the ground of abandonment for failure to support under T.C.A. § 36-1-113(g)(9)(A)(ii). Mother points out that this provision only applies to the parental rights of a person who is not the legal parent or guardian of the child or who is the putative biological father of the child.

The trial court's judgment concludes that Mother willfully failed to support W.K.S. for four consecutive months immediately preceding the filing of the petition or for four consecutive months immediately preceding incarceration. The trial court indeed cites to T.C.A. § 36-1-113(g)(9)(A)(ii) in reaching this conclusion, and Mother's point about its applicability is well taken. We note that the trial court likely intended the finding of abandonment for failure to support to be based upon T.C.A. § 36-1-102(1)(A)(i), as the statutory language set out above reveals. We have already vacated the trial court's judgment on the finding of abandonment for failure to support due to DCS's concession that Mother did not receive proper notice under T.C.A. § 37-2-403. Nevertheless, we vacate the trial court's judgment terminating Mother's parental rights to the extent that it is based upon a finding of abandonment for failure to support under T.C.A. § 36-1-113(g)(9)(A)(ii).

## VII.

Next, Mother argues that the trial court erred by finding clear and convincing evidence of substantial noncompliance with the permanency plans as a ground for terminating her parental rights. In support of her position that she did substantially comply with the obligations placed upon her, Mother points out that she maintained stable housing and employment for at least six months at various times and that she participated in at least half of her counseling sessions.

When evaluating whether a parent has substantially complied with a permanency plan, the Supreme Court has announced the appropriate standard of review as follows:

Substantial noncompliance is a question of law which we review de novo with no presumption of correctness. Substantial noncompliance is not defined in the termination statute. The statute is clear, however, that noncompliance is not enough to justify termination of

parental rights; the noncompliance must be substantial. Black's Law Dictionary defines "substantial" as "[o]f real worth and importance." *Black's Law Dictionary* 1428 (6<sup>th</sup> ed. 1990). In the context of the requirements of a permanency plan, the real worth and importance of noncompliance should be measured by both the degree of noncompliance and the weight assigned to that requirement. Terms which are not reasonable and related are irrelevant, and substantial noncompliance with such terms is irrelevant.

*In re Valentine*, 79 S.W.3d at 548-49. In order to terminate on the ground of substantial noncompliance, this Court has noted the following:

. . . [DCS] must demonstrate first that the requirements of the permanency plan are reasonable and related to remedying the conditions that caused the child to be removed from the parent's custody in the first place, and second that the parent's noncompliance is substantial in light of the degree of noncompliance and the importance of the particular requirement that has not been met. Trivial, minor, or technical deviations from a permanency plan's requirements will not be deemed to amount to substantial noncompliance.

*In re M.J.B.*, 140 S.W.3d 643, 656-57 (Tenn. Ct. App. 2004) (citations omitted).

The record contains two permanency plans with respect to Mother's possible reunification with W.K.S. The first plan is dated February 23, 2005, with an expected achievement date set at August 23, 2005. The second plan, which is dated March 28, 2006, places the expected achievement date at August 23, 2006.<sup>3</sup> The requirements of the two plans are essentially identical, with Mother being obligated to maintain stable housing and employment for six months, become a more effective parent, and stay in frequent contact with DCS. As previously noted, the only difference between the two plans pertains to the requirement to become a more effective parent. The first plan required that Mother undergo a parenting evaluation and follow any recommendations. As will be discussed in more detail, Mother completed her parenting evaluation on February 13, 2006. The second plan obligated Mother to follow the recommendations of her completed parenting evaluation, including continued individual counseling, intensive parenting education to specifically address issues of physical discipline and anger management, and continued alcohol and drug counseling. Mother participated in the development of both plans, and the court ratified both plans. With respect to the second plan, Mother checked a box indicating that she did not agree with the plan, but her specific disagreement is not apparent in the record. Therefore, there appears to be no real dispute that DCS

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<sup>3</sup> We note that the time between March 28, 2006 and August 23, 2006 is only five months, and the requirements placed upon Mother for stable housing and employment were six months. We presume that the August 23rd date is a typographical error and will treat the expected achievement date for the second plan as September 28, 2006.



demonstrated that the requirements of the two plans were reasonable and related to remedying the conditions that caused the child to be removed from the parent's custody in the first place, *i.e.* the physical abuse that Mother inflicted upon W.K.S.

We note that DCS filed its petition to terminate Mother's parental rights on February 7, 2006, nearly a year after entry of the first plan and nearly a month and a half before the second plan was created. This is an unusual procedure for DCS to follow, and it is not entirely clear from the record why DCS instituted termination proceedings between the entry of two permanency plans with identical requirements. Based on the petition, DCS sought to terminate parental rights because Mother was not making sufficient progress in meeting the requirements under the first plan and in remedying the conditions that led to the child's removal. DCS presumably created the second plan so that Mother would have another chance to address the various problems at issue; this, of course, inures to Mother's benefit. At the termination hearing, the proof relating to Mother's efforts covered the span of both permanency plans. Mother does not raise any issue about this timing on appeal, and the trial court did not make any rulings with respect to it. Accordingly, we will treat each specific plan requirement in a collective sense and discuss the evidence which tends to suggest compliance or noncompliance on the part of Mother.

The permanency plans required Mother to maintain safe and stable housing for a minimum of six months. Both plans stated the following with respect to the actions needed to achieve this requirement:

[Mother] will have a home free of environmental hazards and away from Debra Ford, her mother. She will be able to provide for all of her son's physical, emotional, educational, medical and developmental needs.

Mother testified that she lived in five or six places for various amounts of time after W.K.S. was removed from her custody. Immediately after his removal, Mother lived in a trailer for eight and a half months, but she was forced to leave because she did not have a rental contract. Thereafter, Mother rented an efficiency apartment for two months but left because she needed a bigger place. Then, Mother moved to a place in Georgia for four months, but DCS instructed her that she needed to live in Tennessee. At that point, Mother moved to another place in Tennessee for four to five months. According to Mother, DCS determined this place to be uninhabitable for the child, and when her landlord found out about it she was asked to leave. At the time of trial, Mother had been living with her brother for five and a half to six months. She insisted that this was stable housing for the child, but she admitted that her brother could ask her to leave at any point.

Lisa Newcombe, the DCS case worker assigned to this case since May 2005, agreed that Mother did have housing for eight and a half months immediately after W.K.S.'s removal. However, Ms. Newcombe stated that, after that point, Mother lived in several different places for less than six months at a time. With respect to the home in Georgia, Ms. Newcombe explained that if Mother continued to live there the process of regaining custody would take much longer. Ms. Newcombe

confirmed that one place Mother was living needed significant improvement before the child would be allowed to return but that DCS did not direct her to leave. In addition, Ms. Newcombe stated that one of Mother's living places was too close to her mother, Debra Ford, and that their tumultuous relationship was not good for the child. Ms. Newcombe also explained that she tried to assist Mother in obtaining stable housing by providing her with lists of affordable housing.

The permanency plans also required Mother to demonstrate her financial ability for a minimum of six months. Both plans stated the following with respect to the actions needed to achieve this requirement:

[Mother] will get a legal, verifiable income and keep it for six months. [Mother] will provide proof of income to DCS within a month of getting the job. [Mother] will pay child support as ordered by Child Support Court.

Mother testified that she maintained employment during the majority of the time that W.K.S. was in custody. Immediately after the child was removed, Mother ran a house cleaning business for eight and a half to nine months and received cash for her work. During the same period of cleaning houses, Mother also did car detailing work at Thompson Detailing, and she was paid in cash. Mother stated that she quit the house cleaning job because DCS informed her that she needed a pay stub to verify employment. Mother lost the car detailing work when she was incarcerated on the criminal child abuse charges at issue in this case. Thereafter, Mother obtained various jobs for short periods of time, working at Trotter Buick for two and half to three months, Hardee's Restaurant for one month, Heritage Hosiery for one month, and Massey Enterprises for approximately five months. At the time of trial, Mother had been working at K-Mart on a part-time basis for approximately three months. Mother testified that if she regained custody of W.K.S. she could increase her hours at K-Mart or get a second job in order to provide for him.

Lisa Newcombe testified that although Mother claimed to have employment during the majority of the time W.K.S. was in custody, the problem was that she was never able to provide ongoing verification of employment or proof of her financial ability to provide for the child. Ms. Newcombe also explained that DCS tried to assist Mother by providing her with lists of places that would provide vocational and educational training.

As previously noted, the requirement to demonstrate financial ability also included an obligation for Mother to pay child support as ordered by the court. The record contains an order dated October 17, 2006, directing Mother to pay \$204 in child support per month. Mother testified that she made one payment of \$204 following the entry of the order. She explained that she attempted to pay child support prior to that time but that she was unable to do so because the order was not in place. As we just discussed, even though she was not able to verify employment, Mother appears to have been earning some amount of money fairly consistently following the child's removal. Mother knew as early as the initial permanency plan that she was required to support W.K.S. financially, and as noted by the trial court, she was represented by counsel who could have

helped her figure out how to pay support. It matters not when the trial court entered the order directing support. See *In re C.W.W.*, 37 S.W.3d at 477 n.2.

Next, the permanency plans required Mother to become a more effective parent. With respect to the actions needed to achieve this requirement, the first plan stated:

[Mother] will undergo a parenting evaluation with a mental health provider approved by DCS. The evaluation will gauge [her] parenting skills and her relationship with the child. Parent will provide DCS with a release of information for the assessment. Parent will successfully complete any recommendations in the assessment.

According to the first plan, Mother was supposed to complete the evaluation by August 23, 2005. However, Mother did not undergo the evaluation until February 13, 2006, nearly one year after the entry of the first plan and just days after DCS filed its petition to terminate her parental rights. Once Mother completed the parenting evaluation, the second plan stated the following with respect to the actions needed to become a more effective parent:

[Mother] completed her parenting assessment. She will follow the recommendations: Continued individual counseling[;] Intensive parenting education, specifically to address issues of physical di[s]cipline and anger management[; and] Continued A&D counseling.

Dr. Tom Biller, a clinical psychologist, conducted a psychological or parenting evaluation of Mother on February 13, 2006. The purpose of the evaluation, as reflected in Dr. Biller's report, was "to assess [Mother's] functioning in regard to parenting and to obtain information concerning her personality dynamics and emotional status and ability to provide nurturing, safe parenting." Dr. Biller diagnosed Mother with bipolar disorder, generalized anxiety disorder, and borderline personality disorder. His report noted that Mother's bipolar disorder could be controlled with medication. Dr. Biller summarized Mother's ability to function in his report as follows:

She is estimated to be functioning in the Low Average Range of Intelligence. She is not floridly psychotic. She has a significant level of depression and alternating hypomanic moods that are controlled with medication. She has a significant level of anxiety. She appears to have the cognitive ability to provide safe parenting for her children.<sup>4</sup> Her emotional characteristics point to severe

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<sup>4</sup> It appears from the record that Mother has two other children, and neither of these children are in her custody. Interestingly, Mother saw Dr. Biller for a psychological assessment on February 26, 2004, in connection with DCS's removal of one of these other children. At that time, Dr. Biller diagnosed Mother with bipolar disorder without psychotic features but with rapid cycling features, as well as narcissistic personality disorder.

psychopathology that has the potential to impede her ability [to] parent her children. However, she has described that she has been taking mood stabilizer medication and the medication has done very well at helping to control her wide mood swings.

(Footnote added). Dr. Biller recommended that Mother engage in individual counseling to deal with depression and anxiety; family counseling to help with the transition of the child back into her home; and parenting classes to improve her parenting skills.

At the termination hearing, Dr. Biller testified in keeping with his report evaluating Mother's ability to function as a parent. Given her bipolar and personality disorders, Dr. Biller stated that Mother may be inclined to over-discipline out of frustration if the child were particularly oppositional or defiant. However, Dr. Biller further testified that Mother would be able to parent W.K.S. if she was taking her prescribed medication to control her bipolar disorder, going to counseling, and staying away from illicit drugs. Dr. Biller explained that the failure to take prescribed medication or attend counseling would lead to a resumption of Mother's uncontrolled bipolar disorder. With respect to the use of illicit drugs, Dr. Biller stated that it would greatly increase the likelihood of mood changes and mood swings. Dr. Biller also explained that significant mood shifts make it difficult for a child to predict what kind of emotional response he or she will get from a parent, which in turn causes the child to feel less nurtured by the parent.

Mother testified that she followed Dr. Biller's recommendation to participate in individual counseling. She explained that she had been in counseling for years with Sylvia Robles-Myers. According to Dr. Biller's report, Robles-Myers is a psychiatrist who prescribes Mother's medication to control her bipolar disorder. At the termination hearing, Mother admitted that she had not been taking her prescribed medication for about two and a half months, stating that it caused her side effects that she did not like. Mother explained that she had an appointment in the near future to have her medication adjusted.

Mother also testified that she had received individual counseling at Volunteer Behavioral Health ("Volunteer") and Partnership for Families, Children and Adults ("Partnership"). Records of Mother's attendance history at Volunteer between February and August 2006 revealed that she only attended half of her sessions. Nancy Rose, a counselor with Partnership, testified that Mother attended four therapy sessions in May 2006. Then, according to Ms. Rose, it was not until September 2006, that Mother returned and completed four more sessions, twice in September, once in October, and once in November. Ms. Rose explained that it is hard for an individual to make progress if he or she comes on an infrequent basis. Although Mother had not attended anger management classes, Ms. Rose stated that there had been some focus on the topic in their sessions. Ms. Rose described Mother's participation at Partnership as partially compliant, and she stated that Mother had made "some progress." Ms. Rose also stated that she always encouraged Mother to take her prescribed medication regularly.

At the termination hearing, Mother admitted that she began daily use of Methamphetamine following W.K.S.'s removal. Mother began an intensive outpatient alcohol and drug abuse program at Bradford Health Services ("Bradford"). Mother testified that she had one positive drug screen several weeks after entering the program but did not have any more after that time. According to Ms. Newcombe, Mother tested positive for Methamphetamine on October 3, 2005. After completing the intensive program on November 23, 2005, Mother then entered a continuing care program at Bradford. According to Mother, she attended these three-hour sessions four nights per week. At the time of the hearing, Mother had started attending group sessions in Alcoholics Anonymous and Narcotics Anonymous.

Nina Colvin, a crisis coordinator and continuing care facilitator at Bradford, confirmed that Mother attended 20 sessions in order to complete the intensive program. With respect to Mother's participation in the continuing care program, which is supposed to last two years beyond the intensive program, Ms. Colvin stated that Mother had sporadic attendance. During the times that Mother did attend the continuing care program, Ms. Colvin rated her progress as "fair." According to Ms. Colvin, such a rating indicates that Mother has a high tendency to relapse. Ms. Colvin explained that it was also recommended that Mother attend the twelve-step programs of AA and NA, but that Mother had not been successful in meeting this additional recommendation, noting that Mother had only just begun attending this program. In her brief, Mother points out that the permanency plans did not require her to attend any twelve-step programs. We find that this additional recommendation from Ms. Colvin was a reasonable extension of Mother's required alcohol and drug counseling. Finally, Ms. Colvin testified that Mother had not had a positive drug screen since entering the continuing care program, but that there were numerous months where Mother was not screened for drugs because of her failure to regularly attend the required sessions.

Mother also contends that she had transportation problems and that she attended as many counseling sessions as possible without the help of DCS. She argues that DCS failed to provide her with needed transportation to her sessions. Ms. Newcombe testified that when DCS became aware that Mother had transportation problems, bus passes were requested for her but they were denied when it was discovered that Mother's attendance at Bradford was sporadic. In addition, as noted by the trial court, Mother never indicated that she had any trouble getting transportation to and from her various jobs at any time.

With respect to the recommendation that she attend parenting classes, Mother testified that she enrolled in a parenting class at Partnership one week before the termination hearing. Mother explained that the delay in setting up these classes was caused by a number of the places offering such classes being over-booked and having waiting lists. Ms. Newcombe stated that to her knowledge Mother had not completed the necessary parenting classes. We note that, according to the permanency plans, the parenting classes were supposed to be intensive on subjects of physical discipline and anger management. Ms. Newcombe stated that, since her involvement as case manager in May 2005, Mother had demonstrated very little cooperation and had shown very little progress. Ms. Newcombe further testified that Mother had not made a change of circumstances that would cause her to recommend returning the child to her care.

Finally, the permanency plans required Mother to maintain contact with DCS at all times, particularly with respect to “any major change of life circumstances including, but not limited to, change of address, phone number, employment, visitation plans, health or marital status.” Ms. Newcombe testified that Mother maintained very infrequent contact with DCS. According to Ms. Newcombe, Mother’s main contact would occur after a court appearance or if she needed something. Mother explained that she and Ms. Newcombe would disagree when they spoke, so she would not stay in contact with her.

Based upon our independent and careful review of the record, we are unable to conclude that Mother substantially complied with the overall requirements that she maintain safe and stable housing for a minimum of six months, that she demonstrate financial ability with verifiable employment sufficient to provide for the child, that she become a more effective parent through consistent participation in individual counseling, intensive parenting classes, and alcohol and drug counseling, and that she maintain contact with DCS at all times. We recognize that Mother was able to complete some of the requirements under the permanency plans. However, it is clear that Mother’s efforts fell far short of *substantial* compliance, as required by the law, especially in light of the fact that DCS gave her a second chance to correct the numerous problems at issue. Given that W.K.S. was removed from Mother’s custody as a result of suffering physical abuse at her hands, we attach significant weight to Mother’s failure to achieve the requirement to complete parenting classes, which were designed to be intensive on the subjects of physical discipline and anger management. In sum, the evidence is clear and convincing that Mother failed to substantially comply with her obligations as set forth in the permanency plans. Therefore, we hold that the trial court did not err by relying on this ground for termination of Mother’s parental rights.

## VIII.

Mother also argues that the trial court erred by finding clear and convincing evidence of failure to remedy persistent conditions as a ground for terminating her parental rights. Mother specifically contends that the court failed to find that “[t]he continuation of the parent or guardian and child relationship greatly diminishes the child’s chances of early integration into a safe, stable and permanent home,” which is the third factor of the persistent unremedied conditions analysis found at T.C.A. § 36-1-113(g)(3)(C). On this point, Mother’s brief states:

Nothing shows that the Court even considered whether continuation of the parent or guardian and child relationship greatly diminished the child’s chances of early integration into a safe, stable and permanent home; in any case, the Court did not so find.

T.C.A. § 36-1-113(g)(3) requires clear and convincing evidence of all three factors in order to find persistent unremedied conditions as a ground for termination. *In re Valentine*, 79 S.W.3d at 550. However, we find no merit in Mother’s specific contention. Mother clearly ignores the trial court’s finding in its judgment that “Continuation of the parental relationship greatly diminishes

[W.K.S.'s] chances of early integration into a stable and permanent home.”<sup>5</sup> Although the trial court made this finding while addressing the best interest of the child in this case, it would be hyper-technical for us to conclude that the trial court was required to make this finding under the portion of the judgment discussing persistent unremedied conditions.

We further note that Mother’s argument does not appear to challenge the trial court’s conclusions that (1) there are persistent conditions that led to the child’s removal or other conditions that in all probability would cause the child to be subjected to further abuse or neglect and that would prevent the child’s safe return to the care of the parent under T.C.A. § 36-1-113(g)(3)(A), and that (2) there is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent in the near future under T.C.A. § 36-1-113(g)(3)(B). Out of an abundance of caution, however, we will analyze this issue in more detail.

DCS took custody of W.K.S. on an emergency basis after he was observed to have injuries consistent with Mother hitting him in the eye with a shoe, stabbing him in the head with a fork, hitting him in the head with a board, and grabbing him by the head and throwing him into the television. The trial court specifically found that Mother inflicted this physical abuse on the child. In her testimony, Mother denied physically abusing W.K.S. The trial court did not find her explanations to be credible,<sup>6</sup> and we do not find clear and convincing evidence to the contrary. *See Jones*, 92 S.W.3d at 838. Mother was incarcerated on charges of criminal child abuse, and those charges were still pending at the time of trial. The trial court also found that “Mother has provided no proof . . . that she has completed or will soon complete treatment such that there is any certainty that this will not be a problem for her and that the Child will be safe from further abuse at her hands.” Indeed, as we previously found, Mother failed to substantially comply with the overall requirement that she become a more effective parent. She was only partially compliant with attending individual counseling and alcohol and drug counseling. Even more significantly for W.K.S., Mother failed to complete intensive parenting classes to learn how to deal with physical discipline and anger management. As Dr. Biller testified, given her bipolar and personality disorders, Mother may be inclined to over-discipline out of frustration. We further note that Mother was not taking her medication as recommended, and Dr. Biller stated that the failure to take prescribed medication would lead to a resumption of Mother’s uncontrolled bipolar disorder. Based upon all of this proof, we conclude that the evidence does not preponderate against the trial court’s findings, which are supported by clear and convincing evidence, that Mother’s parental rights should be terminated on the basis of T.C.A. § 36-1-113(g)(3).

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<sup>5</sup> Interestingly, despite her statement that “[n]othing shows that the Court even considered” this factor, Mother quotes this language from the trial court in the section of her brief addressing the best interest analysis.

<sup>6</sup> With respect to the incident of stabbing W.K.S. in the head with a fork, Mother explained, “I don’t see how, because we ate with plastic forks if we didn’t eat with finger foods, like, little chicken strips and pizza rolls.” On the subject of throwing W.K.S. into the television by his head, Mother explained that W.K.S. hit the television when she threw him out of the way of a fire caused by her failing to put out a cigarette.

## IX.

Finally, Mother contends that the trial court erred by finding clear and convincing evidence that it was in the best interest of W.K.S. to terminate her parental rights.

The factors a trial court must consider when deciding whether the termination of parental rights is in the best interest of a child are set forth in T.C.A. § 36-1-113(i) (Supp. 2006):

- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
- (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
- (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;
- (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
- (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or



(9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

This list is “not exhaustive,” and there is no requirement that every factor must appear “before a court can find that termination is in a child’s best interest.” *Dep’t of Children’s Servs. v. T.S.W.*, No. M2001-01735-COA-R3-CV, 2002 WL 970434, at \*3 (Tenn. Ct. App. M.S., filed May 10, 2002).

In its final judgment, the trial court stated that termination of Mother’s parental rights was in the best interest of W.K.S. In considering the best interest of the child in this case, we, of course, rely upon the extensive proof detailed above dealing with Mother’s failure to make a lasting adjustment of circumstance, conduct, or conditions that would make it safe for W.K.S. to be in her home, even after reasonable efforts by DCS. *See* T.C.A. § 36-1-113(i)(1), (2). To summarize, Mother failed to meet the permanency plan requirements, even when given a second chance, that she maintain stable housing and employment for six months, become a more effective parent, and stay in frequent contact with DCS. Ms. Newcombe, who saw very little progress and cooperation from Mother, testified that Mother had not made a change of circumstances over a nearly two-year period that would cause her to recommend returning the child to her care. In addition, although Mother testified that she had been employed at various places almost the entire time W.K.S. was in DCS custody, there is no evidence that she paid child support as required under the plans until two months before the termination hearing. *See* T.C.A. § 36-1-113(i)(9).

Most significantly, the evidence is clear and convincing that W.K.S. was the victim of ongoing and escalating physical abuse while in the care of Mother. *See* T.C.A. § 36-1-113(i)(6). In this regard, Mother failed to meet the requirement of becoming a more effective parent by engaging in intensive parenting classes on the subject of physical discipline and anger management. Moreover, there is proof from Dr. Biller that Mother’s mental and emotional status as an individual with bipolar and personality disorders would be detrimental to the child, particularly where, as Mother admits, she does not take her prescribed medication to control her condition. *See* T.C.A. § 36-1-113(i)(8).

It is clear that Mother loves W.K.S. and that she has faithfully visited him, except for when she had court appearances and until her visitations were suspended. *See* T.C.A. § 36-1-113(i)(3), (4). Although these factors do favor Mother, we conclude that a change in caretakers at this time, *i.e.*, returning W.K.S. to the care of Mother, would likely have a profoundly negative emotional and psychological impact on the child. *See* T.C.A. § 36-1-113(i)(5). Lisa Grant has been W.K.S.’s foster mother for nearly two years, welcoming him into her home with her other children after his initial removal. Ms. Grant testified that she and her entire family are very bonded to W.K.S. and that they would love to adopt him. Ms. Grant stated that W.K.S. has always referred to Mother by her real name “Kim” and that he now refers to Ms. Grant as “Mom.” Ms. Grant also explained that when the child first came to them he was developmentally delayed with his speech and learning and that he exhibited significant boundary and aggression issues. She stated that W.K.S. had made

tremendous improvement in these areas and that she is committed to seeing that he continues to progress. We note Mother's argument in her brief that DCS did not direct her to improve the child's purported developmental and aggressive difficulties. In response, we point out that the permanency plans, on the subject of providing housing, stated that Mother "will be able to provide for all of her son's physical, emotional, educational, medical and developmental needs." In addition, we believe that improvement in these areas would fall under the requirement to become a more effective parent. Sylvia Whaley is a licensed professional counselor and has been counseling W.K.S. since March 2005. Ms. Whaley testified that despite suffering extensive violence and emotional abuse, W.K.S. still loves his family of origin. Ms. Whaley noted, however, that the child has an extensive attachment to his foster family and has flourished in their stable home. Ms. Whaley specifically stated that a disruption of W.K.S.'s present placement and returning him to Mother would be very detrimental to him especially if Mother remained "severely disturbed," as she was during their initial session together.

We conclude that the evidence does not preponderate against the trial court's finding, made by clear and convincing evidence, that the termination of the parental rights of Mother is in the best interest of W.K.S.

X.

The judgment of the trial court is affirmed but we vacate portions of the court's rationale for its decision. This matter is remanded to the trial court for enforcement of its judgment and collection of costs assessed below, all pursuant to applicable law. Costs on appeal are taxed against the appellant, K.W.C.

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CHARLES D. SUSANO, JR., JUDGE